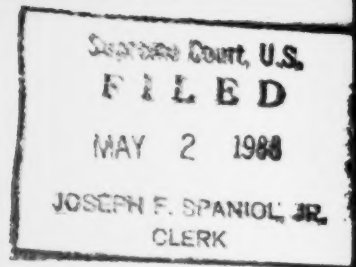


87-1801



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

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No. -

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ISREAL T. ROBLES, *Petitioner*,

v.

STATE OF INDIANA, *Respondent*.

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF INDIANA**

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## QUESTIONS PRESENTED FOR REVIEW

### I.

Whether in light of *United States v. Place*, 462 U.S. 696, (1983) police, during an airport search, may claim exigent circumstances to justify the warrantless opening of a container found within a container in the absence of any attempt to obtain a drug dog or search warrant to open the package.

### II.

Whether the Supreme Court of Indiana's decision in recognizing an "airport" exigency to the search warrant requirement is contrary to the requirement of *Arkansas v. Sanders*, 442 U.S. 753, (1979) and *United States v. Chadwick*, 433 U.S. 1 (1977) that police may not open a package found in a public place without a warrant.

## LIST OF PARTIES

All parties appear in the caption of this case in this Court.

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**OPINION BELOW**

The decision of the Supreme Court of Indiana published at 510 N.E.2d 660 (1987) appears in the Appendix hereto (Appendix A). A timely petition for rehearing was filed and denied without opinion (Appendix B).

**JURISDICTION**

The decision of the Supreme Court of Indiana was entered on July 28, 1987. A timely petition for rehearing was filed and denied on March 2, 1988. This Petition was filed within sixty days of that date as required by 28 U.S.C. §2101(d)

and Rule 20(1) of this Court. The Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

### CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States of America provides in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . ."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### STATEMENT OF THE CASE

A customer service agent for Britt Airway, located at Indianapolis, Indiana, was approached by the defendant, Isreal Robles, at the ticket counter on December 31, 1983 at 3:15 p.m.. Robles was to pick up a prepaid ticket for a flight from Indianapolis to Chicago, Illinois. The defendant, Isreal Robles, was carrying a suitcase. At the request of the customer service agent, Mr. Robles produced identification consisting of "some identification from Puerto Rico" and also a Florida driver's license with a picture on it. Mr. Robles requested that the customer service representative check his luggage which consisted of a small lightweight maroon zippered bag. The suitcase was sent down to the bag room and Mr. Robles left the area of the ticket counter.

The customer service representative became suspicious of the bag because the defendant had produced Puerto Rican identification, a Florida driver's license, and was picking up a one-way ticket to Chicago, Illinois, and had a light carrying bag. The customer service representative conveyed her

suspicious to other Britt employees, and one of them brought Robles' bag to the Britt operations office. Britt operations manager, Kevin Macy, opened Robles bag and found two packages wrapped in duct tape. One package was about the size of a baseball and the other was as large as a football. Macy could not ascertain their contents, so he called the airport police.

Officer Gerald Clinger, responded to the call arriving at the Britt office at approximately 3:40 p.m. Macy showed Clinger the open suitcase with two packages sitting on top of clothing. Clinger picked up the packages and examined them. Clinger made no comment about the packages and peeled back the tape on the small package. After opening the package he field tested the contents for possible narcotics and got a positive reaction. Clinger then made a slit in the larger package and observed the same type of substance.

The tape completely covered both packages and there was no powder of any kind inside the suitcase.

Clinger made no attempt to contact the prosecutor's office before opening the packages. Nor did he try to contact the Indianapolis Police Department, Narcotics office, or the Federal Drug Enforcement Administration. He made no attempt to get a narcotics sniffing dog and made no attempt to get a search warrant for the packages.

Defendant Isreal Robles was then located in the airport and taken into custody.

The petitioner moved to suppress all the evidence by reason of an unlawful search in violation of the Fourth and Fourteenth Amendments to the United States Constitution (Appendix C). That said Motion To Suppress was supported by a Memorandum of Law (Appendix D). On April 11, 1984 the trial court overruled the Motion To Suppress. On September 11, 1984 the trial court found the petitioner guilty as charged and on October 2nd, 1984 the trial court entered judgment of conviction (Appendix E). The defendant ap-

pealed the decision of the trial court to the Supreme Court of Indiana where again the petitioner reasserted the unlawful search in violation of the Fourth and Fourteenth Amendments to the United States Constitution. Thereafter, on July 28, 1987 the Supreme Court of Indiana affirmed the judgment of the trial court (Appendix A).

## REASONS THE WRIT SHOULD BE GRANTED

### I.

**THE SUPREME COURT OF INDIANA HAS DECIDED A QUESTION OF FEDERAL CRIMINAL PROCEDURE IN A WAY WHICH IS IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT, TO-WIT: *UNITED STATES V. PLACE*, 462 U.S. 696 (1983). SPECIFICALLY, THAT POLICE UPON FINDING A PACKAGE DURING A SEARCH OF LUGGAGE MAY OPEN IT BY CLAIMING EXIGENT CIRCUMSTANCES RATHER THAN SEIZING IT.**

The trial Court erred in admitting the cocaine seized by the police in this case. The Indiana Supreme Court erred in affirming the judgment on direct appeal. That Court determined exigent circumstances existed when the suspicious package was due to be put on an airplane from Indianapolis to Chicago within twenty (20) minutes of its discovery by a private party. There were no efforts made either to obtain a search warrant prior to opening the package or secure the package as well as the owner, both whom were easily ascertainable. Had reasonable steps been taken to obtain a drug dog in this case, the loss of the suspicious package as well as its owner could have been greatly minimized or obviated. However, since the record shows that the state did nothing, it should not be able to now claim that it has met its burden of proof to show that an exigent circumstance did in fact exist.

To uphold its finding of exigent circumstances, the Supreme Court of Indiana relied upon two cases, *United*

*States v. Berger*, 355 F.Supp. 919 (W.D.N.Y. 1973) and *United States v. Ogden*, 485 F.2d 536 (9th Cir. 1973). In both of those cases, the respective courts held that exigent circumstances were present when a bag suspected of containing contraband was scheduled for momentary departure. However, the continued validity of those cases is in doubt in light of the recent decisions of the United States Supreme Court in *United States v. Place*, 462 U.S. 696 (1983) and *United States v. Jacobsen*, 466 U.S. 109 (1984), as well as technology developed over recent years concerning detection of illegal substances.

In the Supreme Court of Indiana's opinion affirming Mr. Robles' conviction, (Appendix A) the Court held the officer had probable cause to believe the packages contained illegal drugs. Obviously, if he had probable cause to suspect the packages contained illegal drugs, he certainly had a reasonable suspicion to suspect the package contained illegal drugs. Therefore under *Place*, *supra*, he had a right to make a *Terry* stop of the package. *Place* makes it clear that:

"Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it, or some other recognized exception to the warrant requirement is present."

*Id.*, 462 U.S. at 701.

The Court further stated that:

"In sum, we conclude that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of [*Terry v. Ohio*, 392 U.S. 1 (1968)] and its progeny would permit the officer to detain the luggage to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope."

*Id.*, 462 U.S. at 706.

Explicit in the decision is that the officer has a right to seize the package pending issuance of a search warrant. Certainly the seizure of the bag and the suspicious packages would not have inconvenienced Robles to the same degree as the respondent in *Place* as Robles was unaware of the discovery of the cocaine at that time, and the bag was not taken from his custody. As such this was an occasion where the seizure of the bag would not have been tantamount to the seizure of Robles and hence, the disruption of travel plans as found in *Place* would not have been present. See *Place*, *supra*, 77 L.Ed.2d at 121, 122.

In *United States v. Jacobsen*, 466 U.S. 109 (1984), the Court held that:

“Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package. Such a warrantless search could not be characterized as reasonable simply because after the official invasion of privacy has occurred, contraband is discovered.” *Id.*, 466 U.S. at 114.

The importance of these two cases is that they hold that the police have the right to seize such a package provided they have probable cause to conduct a search, pending the issuance of a search warrant. Indeed, it would be absurd for the Supreme Court of Indiana to hold that Officer Clinger had probable cause to suspect that the packages contained drugs, but not probable cause to seize them to prevent their loss or destruction. Simply the ability to seize the packages obviated any exigent circumstances insofar as the packages were concerned. At the time Officer Clinger was shown the packages, he was under no duty to put them back in the suitcase if he declined to search at that time. Certainly this was not a situation where the state had to conduct an immediate search or risk forever being in ignorance of the contents of the package.

The government has made great strides in combatting the trafficking of illicit drugs over the last eleven (11) years. What may have constituted exigent circumstances in 1973 would not necessarily constitute exigent circumstances today. Due to governmental innovation, devices are being utilized which are able to detect concealed narcotics within seconds without the opening, rummaging and general intrusion associated with a full-scale search.

One such device is the use of dogs that are trained to detect narcotics. This certainly could have been done and there is absolutely no explanation anywhere as to why it was not done in this case. Consider the following excerpts of Officer Clinger's testimony from the record of proceedings. Beginning *Tr. p.224*:

Q. Did you call anybody while you were there?

A. I called for the other two officers that were working over the air.

Q. Other than those two officers did you call anybody?

A. No I didn't.

Q. Did you attempt to call the Marion County Prosecutors Office.

A. No.

Q. Did you attempt to call the Indianapolis Police Department Narcotics Division.

A. No sir.

Q. Did you attempt to call the Federal Drug Enforcement Administration Office?

A. No sir.

Q. Did you attempt at any time to have any kind of narcotic or narcotic trained dog to come out and sniff those packages?

A. No I didn't.

Q. You didn't try?

A. No.

Q. Did you call any court to see if you could get a search warrant?

A. No. \_\_\_\_\_

Q. Didn't try?

A. No.

The reasoning for Clinger's failure to take these steps becomes more apparant referring to the record of proceedings at *Tr. p. 232*:

Q. Have you, in fact, sometime during the recent months within the last year of this arrest, had some training about this kind of situation?

A. Not that I recall.

Q. Didn't you attend any lectures, seminars or training session about searching luggage or packages?

A. No.

Q. Have you ever received any instruction about what you should do in these situations?

A. No.

Q. Have you ever received any instruction about what you should do in these situations?

A. No.

Q. Have you attended the Law Enforcement Academy near Plainfield?

A. Yes sir.

Q. No instruction there?

A. On searching baggage?

Q. Uh huh.

A. Not in the airline context.

Q. How about just searching packages?

A. Yeah, we received search and seizure.

Q. Those packages or bundles as they have been referred to, from the point where you first put them in your hands in the Britt office, you had control of them didn't you?

A. When I put them in my hands, yes.

Q. And they never left your control after that, did they?

A. No.

Q. But you never attempted to get any kind of court authorization by way of a search warrant to open those packages did you?

A. No sir I didn't.

Q. You never even tried.

A. No sir.

Q. You never even asked about it.

A. No I didn't.

Q. If I already asked you this I apologize. Have you ever authorized or ordered anybody to intentionally detain a piece of luggage or a package at the airport?

A. No.

Q. Have you ever known that to happen?

A. No.

Q. Have you ever seen dogs at the airport, narcotic sniffer dogs, I am talking about?

A. No. I have never actually seen the dogs there, no.

Q. You know that there have been some out there though don't you.

A. Yes.

Q. You know the Indianapolis Police Department has those available, don't you?

A. I know that they have the dogs, yes.

For the Supreme Court of Indiana to sanction his actions based upon his lack of knowledge and training in proper procedures would be to encourage law enforcement agencies to withhold new developments in the law and technology from their members. In short, the better trained and experienced police officer would be faulted because in certain circumstances it could be said that "he knew better" whereas an inexperienced officer would be excused because, in effect, it would be said that he did not know what he was doing. To have the admissibility of evidence determined on the basis of such a fortuitous distinction as the officers professional training would turn Fourth Amendment jurisprudence on its head.

What should have happened in his case is that Officer Clinger should have seized the package which he suspected contained drugs under the circumstances. At 3:40 p.m., (as stated in the facts of the court's opinion (Appendix A) when the package was shown to Clinger, he should have made reasonable attempts to further his investigation. If the plane was not due to leave until 4:00 p.m., it is reasonable to presume it would have taken at least one hour flying, landing in Chicago, and taxiing up to the gate before deplaning. Had Mr. Robles been going to O'Hare (it is unclear from the record to which Chicago airport he was flying) the time would have been longer. The gist is that the officer had at least one hour and a half to get a drug detection dog to the scene. A positive reaction would have resulted in Robles' arrest in Chicago on probable cause. (See *Florida v. Royer*, 460 U.S. 491, 506 (1983) holding that a positive reaction from a drug sniffing dog gives rise to probable cause to seize the owner of the suitcase). From 3:40 p.m. until Robles would have left the airplane in Chicago, had this procedure

been followed, there would have been no danger in losing Robles, thus obviating the second exigent circumstance found by the Supreme Court of Indiana, that of possibly losing the suspect.

Since there was not a finding as to the question of whether a drug dog could have been obtained within 1½ hours or however much time it could be said the state had before Robles could have retrieved the bag in Chicago, it cannot be said that exigent circumstances truly existed. The State must prove the existence of exigent circumstances. The defendant need not disprove them. Exigent circumstances are those where the police are faced with an emergency and must act quickly and drastically in order to prevent loss of the evidence or suspect. With Robles completely unaware of what had happened even prior to the discovery of the cocaine, it cannot be said beyond a reasonable doubt that Officer Clinger was required to act as he did.

The fact that these incidents occurred on Saturday, New Years Eve, should be of little consequence in light of what has been discussed above. While it may be difficult, if not impossible, to secure a warrant by that time, so long as probable cause to arrest and detain can feasibly be obtained, the warrant could wait until Monday or Tuesday morning pending a hearing before a magistrate. Based on a positive reaction by a drug sniffing dog, obviously no warrant would have been required to arrest Robles upon arrival in Chicago and, as previously noted, the packages could have been lawfully secured by police pending judicial approval for an examination. While the courts may plan their schedules around holidays, certainly our law enforcement agencies do not. The problem of obtaining a drug dog on New Year's Eve should not have been any more difficult than on any other day at any time. Hence, even though Robles would have "traveled to another jurisdiction" (Appendix A) he would not "have evaded the police." *Id.*

## II.

THE INDIANA SUPREME COURT HAS RECOGNIZED AN "AIRPORT" EXIGENCY TO THE SEARCH WARRANT REQUIREMENT FOR PACKAGES FOUND IN AN AIRPORT WHICH IS CONTRARY TO APPLICABLE DECISIONS OF THIS COURT, TO-WIT: *UNITED STATES V. CHADWICK*, 433 U.S. 1 (1977) AND *ARKANSAS V. SANDERS*, 442 U.S. 753 (1979) BY HOLDING THAT POLICE MAY SEARCH A PACKAGE FOUND IN A SUITCASE WITHOUT A SEARCH WARRANT.

The thrust of the opinion of the Supreme Court of Indiana affirming judgment in this cause has drastic and far reaching consequences which were, in all likelihood, unintended by that Court. In essence the Supreme Court of Indiana has now recognized an "airport exception" to the search warrant requirement. Under that opinion it would make no difference as to the nature of the probable cause, so long as it was there and obtained legally, any suspicious package ready for transportation would be subject to search without a warrant. The result would be no different if the suspected baggage was being loaded into a taxi for transportation off the airport grounds. Such a procedure would completely disregard the holdings of *United States v. Jacobsen*, *supra*, 466 U.S. 109 (1984), *Arkansas v. Sanders*, 442 U.S. 753 (1979) and *United States v. Chadwick*, 433 U.S.1 (1977) which recognize that when police officers possess specific probable cause that certain closed containers contain contraband, those closed containers do not lose their privacy rights simply because they are found under a general exigency to the search warrant requirement.

The gravamen of this Writ is that the state must make all reasonable efforts to negate the exigent circumstances. There was absolutely no effort by the state to do so in this case. This is a dangerous judgment which, under these facts must not give way to rampant searches, even with probable cause, where the whereabouts of the evidence and the sus-

pect can be ascertained and contained with reasonable diligence.

### CONCLUSION

For all the foregoing reasons, Petitioner requests that a Writ Of Certiorari issue to the Supreme Court of Indiana.

Respectfully submitted,

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# **Appendix**



**APPENDIX A**  
**IN THE**  
**SUPREME COURT OF INDIANA**

ISRAEL T. ROBLES,	)	
	)	
<i>Appellant (Defendant Below),</i>	)	
	)	
v.	)	No. 285 S 42
	)	
STATE OF INDIANA,	)	
	)	
<i>Appellee (Plaintiff Below).</i>	)	

**APPEAL FROM THE MARION SUPERIOR COURT**  
**CRIMINAL DIVISION**

**The Honorable Charles C. Daugherty, Judge Cause**  
**Number CR84-4C**

SHEPARD, C.J.

This case presents novel Fourth Amendment questions concerning a modern phenomenon: the transportation of illegal drugs in airline baggage. Appellant Israel T. Robles was convicted after a bench trial of dealing in cocaine, a Class A felony, Ind. Code §35-48-4-1 (Burns 1985 Repl.). He was sentenced to thirty years in prison.

In this direct appeal, Robles challenges the admission of two packages of cocaine seized from luggage which he was carrying immediately before his arrest. The evidence showed that he approached the Britt Airways counter at the Indianapolis International Airport about 3:15 p.m. on December 31, 1983. He was carrying a small, light suitcase and seeking to pick up a prepaid ticket for a flight to Chicago, departing at 4 p.m. Robles produced some type of Puerto Rican identification which did not display a photograph.

When the Britt agent requested identification displaying a photograph, Robles produced his Florida driver's license listing a Miami address.

Robles asked the Britt agent to check his luggage, although the bag was small enough to carry on board. Testimony showed that carry-on luggage would have passed through an x-ray machine, while checked luggage would not. The luggage was sent to the baggage room, and Robles left the Britt counter.

The Britt agent suspected that Robles might be carrying narcotics because of (1) his Puerto Rican and Florida identification; (2) his checking of the lightweight luggage, and (3) the fact that he had a prepaid one-way ticket to a city so far from his home yet carried only a small bag. The agent conveyed her suspicions to other Britt employees, and one of them brought Robles' bag to the Britt operations office. Britt Operations Manager Kevin Macy opened Robles' bag and found two packages wrapped in duck tape. One package was about the size of a baseball and the other was as large as a football. Macy could not ascertain their contents, so he called the Airport police with a report of "suspicious packages."

Officer Gerald Clinger arrived at the Britt office about 3:40 p.m. Macy showed him the open suitcase with the two packages sitting on top of clothing. Clinger asked what they had. Macy said the ticket agent was suspicious of the man who checked the bag. Clinger picked up the packages and examined them. He later testified he believed a felony might be in progress; he had seen pictures of such packages in law enforcement magazines and in police academy classes and knew that they were commonly used to transport drugs. In response to Clinger's questions, the Britt employees said they did not know where Robles was at the moment, but his flight was scheduled to depart at 4 p.m.

Clinger peeled the tape off the smaller bundle and discovered aluminum foil stuck to the tape. He could see a plastic

bag with a white powdery substance under the foil. He conducted a narcotics field test on the white powder and obtained a positive reaction for cocaine. Then he called two other officers, who arrived momentarily. The package was rewrapped and returned to the suitcase. After obtaining a description of Robles, the officers took the luggage and located him at the gate. Robles agreed to accompany police to answer questions concerning the luggage.

After being read his *Miranda* warnings, Robles twice denied that the bag was his. Clinger asked to see Robles' ticket, which matched the tag on the bag. Robles then admitted that he had been carrying the bag but asserted that it belonged to a friend named "Juan" who asked him to carry it to Chicago. Robles said he did not know Juan's last name. Robles was arrested.

Robles first claims that the cocaine was the product of an illegal search and thus was inadmissible at trial. The State contends that Robles does not have standing to raise this issue. The Fourth Amendment protects from unreasonable searches those areas in which a defendant has an actual or subjective expectation of privacy which society recognizes as reasonable. *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220, 226 (1979) (citing *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576, 588 (1967) (Harlan, J., concurring)). An individual possesses a privacy interest, cognizable under the Fourth Amendment, in the contents of his personal luggage. *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). However, mere possession of a searched item does not confer automatic standing to challenge the search on Fourth Amendment grounds, albeit that possession, as in this case, is sufficient to establish criminal culpability. *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980).

Citing *United States v. Tolbert*, 692 F.2d 1041 (6th Cir. 1982), the State argues that a defendant who disclaims ownership in luggage does not possess a reasonable expectation

of privacy in the bag at the time of the search. In *Tolbert*, the defendant completely denied ownership of a piece of luggage, and her disclaimer occurred immediately *before* the search of the luggage by government agents. The Sixth Circuit reasoned that Tolbert had no reasonable expectation of privacy in the luggage because she "affirmatively indicated that she had no interest in preserving the secrecy of the contents. . . ." 692 F.2d at 1045. *See also*, *State v. Machlach* (1987), Ind.App., 505 N.E.2d 873 (defendant who disclaims ownership of suitcase before search has no legitimate expectation of privacy in it).

Robles' case differs in important ways. He was not approached by police and questioned about the luggage until *after* the search. At the time of the search, Clinger had every reason to believe that he was intruding into Robles' privacy interests. He knew Robles had checked the luggage with Britt. How could he have known at that time that Robles later would disclaim ownership?

Moreover, unlike the defendant in *Tolbert*, Robles admitted he was transporting the bag, although he attributed ownership to the elusive "Juan." While this Court has on occasion denied Fourth Amendment standing to defendants challenging the search of a third person's premises or property, those rulings were grounded on the determination that the defendant did not have a reasonable expectation of privacy within the area to be searched. *See, e.g.*, *Stout v. State* (1985), Ind., 479 N.E.2d 563; *Wolfe v. State* (1981), Ind. 426 N.E.2d 647. Thus, ownership of the searched property does not by itself define who falls under the protective umbrella of the Fourth Amendment.

In *United States v. Posey*, 663 F.2d 37 (7th Cir. 1981), a defendant driving an automobile owned by his wife was found to have Fourth Amendment standing to challenge a search of that automobile. *See also*, *Pollard v. State* (1979), 270 Ind. 599, 388 N.E.2d 496. Robles asserted a possessory interest similar to that of Posey and Pollard—a bailment. Under these circumstances, in light of the recognized priva-

cy interest in luggage, we conclude Robles had a reasonable expectation of privacy in the bag and its contents sufficient to allow him to challenge the reasonableness of the search on Fourth Amendment grounds.

The Fourth Amendment proscribes only unreasonable search and seizure by government or its agents; it is wholly inapplicable to a search or seizure conducted by a private individual who is neither an agent of the government nor acting with the participation or knowledge of any governmental official. That employees of a private carrier independently opened the luggage and made an examination that might have been impermissible for a government agent does not render the subsequent official conduct unreasonable *per se*. The reasonableness of the official invasion must be appraised by the extent to which it exceeds the unofficial invasion. *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984).

The Tenth Circuit Court of Appeals has found that a government officer who removes powder from rubber tubes which airline employees have taken out of a package placed for shipment may do so to determine if the substance in plain view is contraband. This plain view inspection, the Tenth Circuit said, falls within the bounds of the private search by airline employees. *United States v. Ford*, 525 F.2d 1308 (10th Cir. 1975). In light of the more recent *Jacobsen* decision, we disagree.<sup>1</sup> In this case, it seems more likely that the officer's unwrapping of the package and subsequent test were searches within the meaning of the Fourth Amendment. State does not contend otherwise.

Warrantless searches of sealed packages are presumptively unreasonable under the Fourth Amendment. *United States v. Jacobsen*, 466 U.S. 109. However, the validity of a warrantless search and seizure turns upon the facts and circumstances of each case. *South Dakota v. Opperman*, 428

<sup>1</sup>It is important to note that a white powder was visible in the suspicious containers in *United States v. Ford*, as in *Jacobsen*, although the Court in *Ford* did not focus on that fact in rendering its opinion.

U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976); *Guardiola v. State* (1978), 268 Ind. 404, 375 N.E.2d 1105. When the defendant challenges a warrantless search, the State has the burden of showing that the search fell within one of the exceptions to the warrant requirements. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); *Murphy v. State* (1986), Ind., 499 N.E.2d 1077. One such exception exists when police have probable cause to believe the search will produce evidence that a crime has been committed and are faced with exigent circumstances which render the procurement of a warrant impractical. *Zimmerman v. State* (1984), Ind. App., 469 N.E.2d 11.

Probable cause exists where the facts and circumstances within the knowledge of the officer making the search, based on reasonably trustworthy information, are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed. *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). Clinger knew that the luggage had been carried by a person who had raised the suspicions of a Britt agent. He also recognized the unique packages as those commonly used to transport drugs. Like the heroin-filled balloon in *Texas v. Brown*, "the distinctive character (of the container) spoke volumes as to its contents—particularly to the trained eye of the officer." 460 U.S. 730, 743, 103 S.Ct. 1535, 1544, 75 L.Ed.2d 502, 514 (1983). Under these circumstances, Clinger had probable cause to believe the packages contained drugs.

The existence of probable cause, of course, does not relieve police from the warrant requirement. "Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package." *United States v. Jacobsen*, 466 U.S. at 114.

Exigent circumstances may justify a warrantless search where there is probable cause. However, that exception is

not "a *per se* rule to be applied indiscriminately to . . . every object that has the capacity for movement. Rather, its application should depend upon an evaluation of attendant circumstances." *United States v. Valen*, 479 F.2d 467, 470 (3rd Cir. 1973).

The detection of contraband by airline employees shortly before the owner's flight departure has been found to constitute exigent circumstances justifying a warrantless search of the suspicious package. *United States v. Berger*, 355 F.Supp. 919 (W.D.N.Y. 1973). Compare *United States v. Soriano*, 482 F.2d 469 (5th Cir. 1973) (suitcase of defendants arrested on drug charges may be seized but not searched without a warrant). Exigent circumstances also have been found when a bag containing the suspected contraband is scheduled for momentary departure. *United States v. Ogden*, 485 F.2d 536 (9th Cir. 1973).

Exigent circumstances in this case also justified a warrantless search. Clinger opened the packages and conducted the field test about 3:40 p.m. on New Years Eve, a Saturday. It was unlikely that he would have been able to obtain a warrant before the end of that holiday evening and impossible to do so before Robles' plane departed for an out-of-state destination at 4 p.m. If the officer had confiscated the packages until a warrant was obtained, Robles probably would have evaded the police by traveling to another jurisdiction. The Court of Appeals has found exigent circumstances justifying a warrantless arrest when the suspect is traveling in a moving vehicle which may quickly and easily transport him from the jurisdiction. *Payne v. State* (1976), 168 Ind. App. 394, 343 N.E.2d 325. Although it is the search and not the arrest which is at issue in this case, a finding of exigent circumstances also is merited here. Under these circumstances, the officer's warrantless search of the packages was not unreasonable within the meaning of the Fourth Amendment.

Robles also claims that the packages of cocaine were improperly admitted because the State did not establish a

proper chain of custody. The evidence showed that Clinger placed the two packages wrapped in duct tape in a sealed plastic bag and took the bag to the Indianapolis Police Department laboratory, where he gave it to an IPD chemist. The chemist logged in the exhibit and placed it in a safe. She later removed the exhibit for testing. She testified at trial that when she did so both packages had tape on them, but she was not certain that one was wrapped with duct tape.

The State's burden in an attack on the validity of a chain of custody is to show the continuous whereabouts of the evidence. The mere potential for tampering does not make the evidence inadmissible, and the State is not required to exclude every possibility of tampering. However, when the evidence is fungible, as in the case of drugs, the importance of a proper chain of custody is enhanced. The proper showing of a chain of custody must give reasonable assurance that the property passed through the hands of the parties in an undisturbed condition. *Gorman v. State* (1984), Ind., 463 N.E.2d 254.

The State established a sufficient chain of custody by demonstrating the continuous whereabouts of the packages of cocaine. The chemist's failed memory created at best the mere possibility of tampering and thus did not make the packages inadmissible. Furthermore, Clinger identified the packages at trial and noted that they were in substantially the same condition, aside from some changes made by the chemist during her tests. We find no error in the admission of the drugs.

The judgment of the trial court is affirmed.

DeBRULER, GIVAN, PIVARNIK and DICKSON, JJ.,  
concur.

**APPENDIX B**

**ISRAEL T. ROBLES V. STATE OF INDIANA**

You are hereby notified that the SUPREME COURT has on this day Appellants petition for Rehearing is Denied, without Opinion. Shepard, C.J. All Justices Concur.

WITNESS my name and the seal of said Court, this 2 day of MAR, 1988

/S/ Daniel Heiser

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Clerk Supreme Court and  
Court of Appeals

APPENDIX C

MARION COUNTY SUPERIOR COURT  
CRIMINAL COURT DIVISION III

STATE OF INDIANA     )  
                              ) SS:  
COUNTY OF MARION    )

STATE OF INDIANA                     )  
  )  
      vs.                                 ) CAUSE No. CR84-004C  
  )  
ISREAL T. ROBLES                     )

MOTION TO SUPPRESS

Comes now the defendant, Isreal Robles, by counsel, and moves the Court to suppress the evidence herein for the reason that said evidence was procured by reason of an unlawful search in violation of the Constitution of the State of Indiana and the Fourth Amendment to the Constitution of the United States.

In support of said motion defendant would show the Court:

1. That on December 31, 1983, the defendant checked a piece of luggage at the Britt Airline office at Indianapolis International Airport.

2. That thereafter said luggage was opened by employees of Britt Airlines, and two sealed packages were found inside said suitcase.

3. That employees of Britt Airline notified the airport police to come to the Britt office.

4. That Officer Clinger of the Airport Police Dept., arrived at the Britt office and immediately opened the sealed

packages which had been inside the luggage checked by the defendant.

5. That Officer Clinger had no warrant for the search of the luggage on the packages contained therein, nor did he have probable cause to conduct a search of said items.

WHEREFORE, Defendant prays the Court to grant his Motion to Suppress the Evidence herein, and for all other just and proper relief in the premises.

/S/ Dennis E. Zahn

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/S/ James H. Voyles

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ATTORNEYS FOR ISREAL T.  
ROBLES

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served upon the Marion County Prosecutor, 560 City-County Building, Indianapolis, Indiana, 46204, on the date of filing.

/S/ Dennis E. Zahn

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/S/ James H. Voyles

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ATTORNEYS FOR ISREAL T.  
ROBLES

OBER, SYMMES, CARDWELL,  
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300 Consolidated Building  
Indianapolis, Indiana 46204  
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APPENDIX D

- MARION COUNTY SUPERIOR COURT  
CRIMINAL COURT DIVISION III

STATE OF INDIANA     )  
                              ) SS:  
COUNTY OF MARION    )

STATE OF INDIANA                     )  
  )  
      vs.                                ) CAUSE No. CR84-004C  
  )  
ISREAL T. ROBLES                     )

MEMORANDUM

The defendant, Isreal Robles, submits that Officer Clinger had no probable cause to open the packages contained in the luggage which had been previously checked at Britt Airlines.

Defendant submits that the evidence herein will show that the police officer was told that the airline employees were "suspicious" of the defendant. Prior to opening the packages, however, the officer had no additional information concerning the defendant or the packages, other than the airline agent felt the defendant was "suspicious".

In *United States v. Chadwick* 433 U.S. 1 (1977) the United States Supreme Court held that closed packages and containers may not be searched without a warrant.

The evidence will show that there are no exceptions to the requirements of obtaining a search warrant. There was no "plain view"; the packages were wrapped in duct tape, no powder or residue was visible on the outside, the officer did not associate these packages as any "single purpose" container commonly used for packaging drugs.

Further, the evidence will show that the observations of the police officer when he arrived on the scene, would not have given him probable cause to open and search these packages, nor was the officer supplied with information from the Britt employees that would have established probable cause to search the packages.

In the case of *United States v. Ross* 102 S. Ct. 2157 (1982) the U.S. Supreme Court said: "In *Chadwick*, the Court reaffirmed the general principle that closed packages and containers may not be searched without a warrant.

*Ross*, supra, also held that all containers are equally protected by the 4th Amendment. The Court, in *Ross*, supra, said: "This rule applied equally to all containers, as indeed we believe it must." One point on which the Court was in virtually unanimous agreement in *Ross* was that a constitutional distinction between "worthy" and "unworthy" containers would be improper. Even though such a distinction perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other, the central purpose of the 4th Amendment forecloses such a distinction. "For such as the most frial cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case."

In a plurality opinion in *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971) the Supreme Court held that in order for the "plain view" doctrine to warrant a seizure it must be "immediately apparent" to the searching officer that he has contraband or evidence of a crime before him.

The Supreme Court in *Texas v. Brown*, \_\_\_, U.S. \_\_\_, 33 Cr.L. 3001 (1983) in an opinion by Justice Rehnquist criticized the "use of the phrase 'immediately apparent'" as a

"very likely . . . unhappy choice of words" in *Coolidge v. New Hampshire*, 403 U.S. 443, n. 24 (1978), "since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine".

Rather, than some "high degree of certainty" the Court held the officer needs only "probable cause to associate the property with criminal activity" (at pp. 3303).

*Texas v. Brown, Supra:*

"It merely requires that the facts available to the officer would 'warrant a man of reasonable caution and belief' . . . that certain items may be contraband or stolen property or useful and evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false."

The Court found that the fact the particular "party balloon" seen in defendant's vehicle was "knotted about one-half inch from tip" and that in the experience of the arresting officer (and a testifying chemist) "narcotics frequently were packaged in "distinctive containers", coupled with the open glove compartment containing "several small plastic vials, quantities of loose white powder, and an open bag of party balloons", constituted probable cause to seize the balloon in "plain view".

The concurring justices in *Texas v. Brown*, were quick to point out that while the officer there had probable cause to believe he had evidence of a crime before him ". . . a closed container may not be opened without a warrant, even when the container is in plain view and the officer had probable cause to believe contraband is concealed within "[citing *Chadwick* and *Sanders*] unless "there was probable cause to search the entire vehicle" [under *Ross*] or [there was virtual certainty that the balloon contained a controlled substance "because the balloon was "one of those rare single-purpose containers" which by its nature could not support any "reasonable expectation of privacy [under *Sanders*].

*United States v. Johns* (9th Cir., June 10, 1983) \_\_\_\_ F. 2d, \_\_\_\_, 33 Cr. L. 2254:

"As we read the plurality and concurring opinions in *Brown* . . . they establish only that the *seizure* of the container in plain view was justified when there was probable cause to believe that it contained contraband. We have no difficulty in agreeing that in the present case, the officers acted lawfully and justifiably in seizing the packages. It is a different question, however, whether an opaque container is properly seized may be searched.

As Justice Stevens pointed out in his concurrence in *Brown*, there is no risk that evidence contained in such a container will be destroyed once it has been seized by the police; thus, an officer is not excused from the duty to obtain a warrant from a neutral magistrate before opening it . . ."

We conclude, therefore, that *Brown* does not support the warrantless search here." [33. Cr. L. at pp. 2255]

In *U.S. v. Place*, 33 Cr. L. 3183 (1983), the Supreme Court considered "whether the Fourth Amendment prohibits law enforcement authorities from detaining personal luggage for exposure to a trained narcotics detection dog on the basis of reasonable suspicion that the luggage contains narcotics", (at p. 3186). The Court concluded that a "sniff test" by a well trained narcotics detection dog does not constitute a "search" requiring probable cause under the Fourth Amendment, and "that when an officer's observations lead him to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, *provided that the investigative detention is properly limited in scope.*" (emphasis added) (at p. 3188).

As to the "scope" of such detentions the Court concluded that "the limitations applicable to investigative detentions of the person should define the permissible scope of the inves-

tigative detention of the person's luggage on less than probable cause". (at p. 3189).

Relevant factors to be considered in determining whether the detention exceeds the limitations applicable to investigative detentions include the "brevity of the invasion", (at p. 3189), and "whether the police diligently pursue their investigation", (at p. 3189).

"Although we have recognized the reasonableness of seizures longer than the momentary ones involved in *Terry, Adams, and Brignoni-Ponce*, see *Michigan v. Summers, supra*, the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. Moreover, in assessing the effect of the detention, we take into account whether the police diligently pursue their investigation." *U.S. v. Place*, 33 Cr. L. at p. 3189.

In this case, Officer Clinger, made no effort to obtain a warrant; no effort to have the packages put under the trained nose of a narcotics dog; no attempt to question the defendant prior to seizing and searching the packages. He did not detain the packages briefly to investigate the circumstances that aroused his suspicion.

WHEREFORE, Defendant prays his Motion to Suppress be granted and for all other just and proper relief in the premises.

Respectfully submitted,

/S/ Dennis E. Zahn

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/S/ James H. Voyles

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ATTORNEYS FOR ISREAL T.  
ROBLES

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served upon the Marion County Prosecutor, 560 City-County Building, Indianapolis, Indiana, 46204, on the date of filing.

/S/ Dennis E. Zahn

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/S/ James H. Voyles

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ATTORNEYS FOR ISREAL T.  
ROBLES

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Indianapolis, Indiana 46204  
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APPENDIX E

COMMITMENT TO  
CUSTODY OF THE DEPARTMENT OF CORRECTION

STATE OF INDIANA     )  
                              ) SS:  
COUNTY OF MARION    )

THE MARION SUPERIOR COURT CRIMINAL DIVI-  
SION THREE October 2, 1984  
TO THE SHERIFF OF MARION COUNTY, GREETING:

BE IT REMEMBERED, that heretofore, at a term of the Marion Superior Court, Criminal Division, III in the State of Indiana, at the Court House in the City of Indianapolis, on the 2nd day of Oct., 1984, before the Honorable CHARLES C. DAUGHERTY Judge of Division Three of said Court, proceedings were had in the cause of

STATE OF INDIANA     )           No. CR. CR84-004C  
                              )  
VS.                     ) SS: CRIME: DEALING IN  
                              ) COCAINE Class A  
                              ) Felony  
ISREAL T. ROBLES     )

Comes now the State of Indiana by Mark Jones Deputy Prosecuting Attorney; comes also the defendant in person and by counsel Dennis Zahn and James Voyles and the Court having found that the defendant is 39 years of age and is guilty of the crime of:

DEALING IN COCAINE (CLASS A FELONY)  
as charged in or covered by the information or indictment in this cause.

IT IS Therefore Ordered and Adjudged By the Court that the said defendant for the offense by him committed, shall make his fine to the State of Indiana in the penal sum of -0-Dollars, that he be imprisoned for a period of: THIRTY

(30) YEARS

and that he pay and satisfy the costs and charges herein, taxed at \$61.00.

Further, that the defendant is to be given credit towards service of his sentence for 22 days spent in confinement as a result of the criminal charge for which this sentence is imposed or as a result of the conduct on which the charge herein is based, and the court recommends that said credit of days be considered in assessing credit for goodtime conduct, as provided by law.

The Sheriff of Marion County is hereby charged with the due execution of the foregoing judgment.

STATE OF INDIANA       )  
                                      ) SS:  
COUNTY OF MARION     )

I, BERNARD J. GOHMANN, JR., Clerk of the Superior Court of Marion County, in the State of Indiana, do hereby certify that the foregoing is a true and complete copy of the judgment of said Court in the above entitled cause, on the day and year first aforesaid as appears on record in my office.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Superior Court of Marion County, at my office in the City of Indianapolis, this 2nd day of October, 1984

BERNARD J. GOHMANN,  
JR., Clerk,  
Marion Superior Court Criminal Division,

/S/ By \_\_\_\_\_ Deputy,